PUBLIC PROSECUTOR v. MARY SHIM

[O.Cr.J. (Adams J.) August 9, 1961]

[Muar — Criminal Trial No. 5 of 1961]

Criminal Law and Procedure — Discharge at Preliminary Inquiry — Whether fresh Preliminary Inquiry could be held on same facts — Whether discharge amounted to acquittal — Autrefois acquit — Purpose of Preliminary Inquiry — Criminal Procedure Code (Cap. 6), ss.140, 143 and 254.

A discharge at a preliminary inquiry does not prevent the holding of a fresh preliminary inquiry on the same facts before another Magistrate. The plea of *autrefois acquit* cannot be founded on a discharge at a preliminary inquiry.

Cases referred to:—

(1) *Goh Onn Keow & Anor.* v. *Public Prosecutor* [1949] M.L.J. 35.

(2) *Public Prosecutor* v. *Mat Zain* [1948-49] M.L.J. Supp. 142.

(3) *Seet Ah Ann* v. *Public Prosecutor* [1950] M.L.J. 293.

(4) *Ariffin bin Cassim Jayne* v. *Public Prosecutor* [1953] M.L.J. 126.

(5) *Tan Ah Chan* v. *Public Prosecutor* [1955] M.L.J. 219.

(6) *Dwaraka Nath Mondul* v. *Beni Madhab Banerjee* I.L.R. 28 Cal. 652.

(7) *Theopillai* v. *Public Prosecutor* 2 M.C. 230; [1956] M.L.J. 177.

CRIMINAL TRIAL.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the prosecution.

David Marshall for the accused.

Adams J.: The accused in this case is charged before me with doing an act on the 6th day of June, 1960, at No. 16, Jalan Lama, Muar, with intent to cause the miscarriage of one Lily Tan who was pregnant which act caused the death of the same Lily Tan.

Before the case opened Mr. Marshall sought to enter a plea in bar. He sought to argue that the effect of previous proceedings against the accused amounted to her acquittal on this charge. It is therefore necessary to examine in some detail the facts leading up to the present committal of the accused.

Apparently a preliminary enquiry commenced on the 2nd of November, 1960, at which Mr. Marshall represented the accused. After hearing 2 witnesses, for some inexplicable reason the Prosecuting Officer telephoned to the then Deputy Public Prosecutor and asked permission to withdraw the charge against the accused. What transpired during that telephone conversation is not known but the following day the Prosecuting Officer rose and intimated to the Court that he was instructed by the Deputy Public Prosecutor to offer no further evidence. The Magistrate then discharged the accused. Why such a course was taken by the Deputy Public Prosecutor it is impossible to say. All the witnesses called during the course of this trial were present and on the statements that they subsequently made in a second preliminary enquiry there was ample evidence on which to commit the accused for trial.

Apparently the Deputy Public Prosecutor must have asked for the papers because he wrote to the learned Magistrate at Muar on the 13th of November saying that he had perused the evidence taken at the preliminary enquiry held on the 2nd November and was desirous that a fresh preliminary enquiry be held before another Magistrate. He asked the learned Magistrate to permit the necessary arrangements to be made for this to be done.

The second preliminary enquiry was commenced on the 1st of March and resulted in the committal of the accused who now stands charged before me. This Mr. Marshall says is a gross abuse of process of the Court. He has pointed out that all the witnesses were present at the first preliminary enquiry and no additional evidence was produced in the second one. Mr. Marshall's main point however was that neither section 140 or 143 of the Criminal Procedure Code applied because the learned Magistrate had not heard all the evidence and because the learned Deputy Public Prosecutor had, through the prosecuting officer, tendered no further evidence. Mr. Marshall argued therefore that the discharge of the prisoner must have been under section 254 of the Criminal Procedure Code, and therefore in the absence of special reasons, the accused was entitled to an acquittal at the end of the preliminary enquiry. Mr. Marshall cited the following cases: *Goh Onn Keow & Anor.* v. *Public Prosecutor*(1); *Public Prosecutor* v. *Mat Zain*(2); *Seet Ah Ann* v. *Public Prosecutor*(3); *Ariffin bin Cassim Jayne* v. *Public Prosecutor*(4); *Tan Ah Chan* v. *Public Prosecutor.*(5)

With respect to Mr. Marshall all those cases except *Mat Zain's* case have reference to a discharge during the course of a trial. The facts in *Mat Zain's* case are not clear. The words used by Callow J. are "Mr. Boyle, Deputy Public Prosecutor, informed me that the accused had actually been arraigned before a Magistrate and discharged, the discharge not amounting to an acquittal." It may be that he had been charged with some offence. But if the second paragraph of the judgment purports to say that if the prosecution withdrew a case during the course of a preliminary enquiry the Magistrate should acquit and discharge the accused under section 254 or record his reasons for not so doing, I respectfully disagree with the learned Judge.

Chapter XXIV of the Criminal Procedure Code is headed "General Provisions as to Inquiries and Trials". Some of the provisions of this Chapter apply to both Inquiries and Trials in which case it is so stated clearly in the body of the section. From the wording of section 254 it is perfectly clear that this section applies to trials only. The wording used in sub-section (i) is "At any stage of any trial before the delivery of judgment, etc. . . . . ", and in sub-section (ii) "At any stage of any trial before a District Court or Court of a Magistrate before the delivery of judgment, etc. . . . . ". A preliminary enquiry is obviously not a trial and there is no judgment. It is what it purports to be an enquiry conducted by the Magistrate to find out whether or not there is sufficient evidence on which to commit an accused person for trial before the High Court. The only matter therefore now to consider is as to what the effect of the discharge by the learned Magistrate was. *Mallal's Criminal Procedure,* 4th Edn. p. 191 states quite categorically that the discharge at the end of a preliminary equiry does not amount to an acquittal. This is also repeated by *Sohoni* 14th Edn. at p. 436.

The Indian cases do not help because the provisions of the Indian Criminal Procedure Code are not the same as the Code in force here. However on the question of principle they can give some indication. In *Dwaraka Nath Mondul* v. *Beni Madhab Banerjee,*(6) which was a case of criminal breach of trust, the Magistrate discharged the defendant because of the complainant's absence. Subsequently he revived the charge against the defendant at the request of the complainant without having his order of discharge set aside by a superior Court. The case was before a full bench and in the course of the judgment Prinsep J. said as follows:

" I cannot understand why obstacles should be placed in the administration of justice, and why a complainant should not be entitled to require a Court to try a case before it and to hear all his evidence, if the complainant can satisfy it that he has good grounds for his complaint. What would be the position of any Magistrate, if, after an order dismissing a complaint or discharging the accused had been passed, the complainant appeared before him with another complaint and asked for its trial? The order of dismissal or discharge could not be pleaded as a bar to the proceedings under section 403. But it is the law, as it has been declared by the reported cases, that has raised an impediment. The High Court has thought proper to hold that such an order must be set aside by a superior Court before any Magistrate can proceed to hear such a complaint. But I have never been able to agree to this view, for it has seemed to me that there is nothing to set aside. There is no bar to further proceedings under the law, and, therefore, a Magistrate to whom a complaint has been made under such circumstances is bound to proceed in the manner set out in section 200, that is to examine the complainant, and, unless he has reason to distrust the truth of the complaint, or for some other reason expressly recognised by law, such as, if he find that offence had been committed, he is bound to take cognizance of the offence on a complaint, and, unless he has good reason to doubt the truth of the complaint, he is bound to do justice to the complainant, to summon his witnesses and to hear them in the presence of the accused."

It would seem to me therefore logical that where the Deputy Public Prosecutor discovers that there has been a mistake and that as in this case no further evidence was offered when there was ample evidence to secure the committal of the prisoner it would be open to the learned Deputy Public Prosecutor to request another Magistrate to conduct a fresh preliminary enquiry. It is clearly in the interests of justice that this should be done. This would also appear to be the view of the Court of Appeal. The case of *Theopillai* v. *Public Prosecutor,*(7) was decided on another point. But Thomson J. as he then was had this to say:

" Now, there is nothing sacrosanct about the decision of a Magistrate in a preliminary enquiry. In particular, if the Magistrate discharges the accused person under section 140 it does not amount to an acquittal for the accused has never been tried. Probably it does not prevent further proceedings with a view to committal on the same facts being brought before some other Magistrate."

This case went to the Court of Criminal Appeal and it was reported in [1956] M.L.J. p. 177. Mathew C.J. said:

" It is not for us to say what instructions may properly be given on a preliminary enquiry that has been concluded by the discharge of an accused person. Had it been the intention of the legislature to give the Public Prosecutor the power to direct a Magistrate to reverse his order of discharge and commit the accused for trial, this power would have been expressed in plain and clear language. Why, indeed, should the Public Prosecutor be given this unusual power, when he has an appropriate remedy in that he can order the holding of another preliminary enquiry before another Magistrate?"

This clearly could not be done if the effect of the Magistrate's discharge was an acquittal.

The plea *autrefois acquit* is imported into the criminal procedure of this country by section 302 of the Criminal Procedure Code and is only available when a person has been once tried by a Court of competent jurisdiction. A person brought before a Magistrate for the purpose of a preliminary enquiry is not tried. Nor is he in fact charged. The purpose is to enquire into the evidence and then if there is sufficient evidence which makes out a *prima facie* case against the prisoner to frame a charge and to commit him to the High Court for trial. I see no reason why the Deputy Public Prosecutor should not have requested that a fresh preliminary enquiry be commenced before another Magistrate. It was clearly in the interests of justice that he should do so in the present case and for those reasons I ruled that the prisoner was properly committed to trial.

[The rest of the judgment deals with the facts and is omitted from this report. — *Ed.* - M.L.J.]

Order accordingly.

Solicitors: *Marshall & Chung.*